Supreme Court, U.S.
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No. 94-1440

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

State of California,

Petitioner,

v.

Celestus Blair, Jr.,

Respondent.

On Petition For Writ Of Certiorari

To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does 28 U.S.C. § 2403(b) provide standing to nonparty State of California to prolong an action, to which it was never a party, after the actual parties settled the case by a consent judgment that eliminated any case or controversy?

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I. JURISDICTION

The Supreme Court has jurisdiction to review decisions of the courts of appeal by writ of certiorari pursuant to 28 U.S.C. § 1254. However, this Court lacks subject matter jurisdiction over the State's petition for a writ of certiorari, because Blair's damages claim pursuant to 42 U.S.C. § 1983, which supplied the case or controversy necessary for Article III jurisdiction, was settled by a consent judgment without preserving any right of appeal. *Blair v. Shanahan*, 38 F.3d 1514, 1519-20 (1994) (App. A 26-31); *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994) (no subject matter jurisdiction to review judgments mooted on appeal).

The State presumes its standing because it participated in the District Court pursuant to 28 U.S.C. § 2403. However, section 2403 does not confer standing upon the State independent of the constitutional issues or of the case or controversy on which the action was founded. *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991); *Blair*, 38 F.3d at 1522 (App. A at 36); *see Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978) (section 2403(a) does not confer upon the United States standing to appeal where the actual parties had resolved their constitutional dispute). On those grounds, the Ninth Circuit held that the State had no standing to participate in the motion made pursuant to Federal Rule of Civil Procedure 60(b) to vacate the

consent judgment, to which the State was a stranger. *Blair*, 38 F.3d 1514, 1519-20 (1994) (App. A at 28-29).

II. STATEMENT OF THE CASE

The State of California seeks to prolong a lawsuit settled in 1991. That settlement resolved the state and federal constitutional issues, leaving only ordinary procedural issues.

Respondent Celestus Blair, Jr. had sued the City and County of San Francisco, its Police Chief, and several police officers (collectively the "City") for repeatedly arresting him, without the probable cause required by the Fourth and Fourteenth Amendments, and pursuant to a California vagrancy statute, California Penal Code § 647(c), which the District Court held was facially unconstitutional under the First and Fourteenth Amendments of the United States Constitution. Blair sought and obtained relief only from the City. Blair did not name the State as a defendant. The District Court notified the State under 28 U.S.C. § 2403(b) of the constitutional challenge to section 647(c).

The State did not then elect, and has not since elected, to intervene as a party-defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure. Instead, the State elected statutory *amicus curiae* status "[p]ursuant to 28 U.S.C. § 2403(b) . . . for the limited purpose of presenting evidence and argument on the constitutionality of Penal Code § 647(c)," representing to the District Court that "[e]xcept by this intervention, *the State is not a party to this action.*"

(State's Notice of Intervention SER 3-4); ER 19 at 1, p1 (emphasis added). The State has since repeatedly stressed the limited nature of its participation.1/

When Blair and the City cross-moved for partial summary judgment, the State filed briefs and presented oral argument supporting the constitutionality of section 647(c). *Blair v. Shanahan*, 795 F. Supp. 309, 318 (N.D. Cal. 1992) ("*Blair* II"). On September 24, 1991, the District Court issued a memorandum opinion declaring, *inter alia*, that section 647(c) was facially unconstitutional under the First and Fourteenth Amendments. *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991) ("*Blair* I").

After the District Court refused to certify the declaratory judgment for interlocutory appeal, the State announced that its participation in the case was at an end: "We will retire at this point and wait for the final disposition of the case." ER No. 146, 4:17-18. The State did not participate in the subsequent settlement discussions

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1/ *E.g.*, "The State's intervention is limited to defending the facial validity of section 647(c)." Appendix filed with Blair's Motion to Dismiss State's Appeal, Tab. F. As no Supreme Court record currently exists, these factual references are to the record before the Ninth Circuit. (In this brief, "ER" represents Excerpts of Record filed by the City and "SER" represents Supplementary Excerpts of Record filed by Blair). Citations in this Brief to the Appendix ("App.") are to the Appendix to the Petition for Certiorari, unless otherwise noted.

between Blair and the City, or in the December 1991 settlement resulting from Blair's acceptance of the City's Rule 68 offer of judgment.[2/] The District Court entered judgment for Blair on January 2, 1992.

The City immediately announced its intention to appeal its Rule 68 consent judgment, but soon lost confidence in the validity of that position, and moved pursuant to Fed. R Civ. P. 60(b) to vacate the judgment it had offered on the grounds of mistake, inadvertence, surprise, or excusable neglect. The State then filed its own Rule 60(b) motion, arguing for the first time -- *after* the entry of final judgment and *after* Blair challenged the State's standing to vacate the judgment under Rule 60(b) -- that section 2403 conferred party status upon the State for some (but not all) purposes beyond the presentation of constitutional issues.[3/] Even then, however, the State did not claim Rule 24 party intervenor status, and did not move to intervene under Rule 24 for purposes of taking an appeal.

[2/] The judgment admitted *the City's* liability for Blair's Fourth Amendment claims, and also provided that judgment would taken against *the City* "in accordance with the Court's Opinion and Order" holding section 647(c) unconstitutional. *Blair II*, 795 F. Supp. at 312 (App. C at 55).

[3/] The State has never sought party status for the purpose of accepting the risk of liability.

The District Court denied the State's motion because the State did not have standing to file or argue a procedural motion to vacate a judgment to which it was not a party. *Blair II*, 795 F. Supp. at 318-319 (App. C. at 72). The Ninth Circuit affirmed, holding that section 2403 does not afford the state "standing to participate in a motion where questions of constitutionality are not among the issues argued." 38 F.3d at 1522 (App. A at 35-36). The Ninth Circuit also held that Article III jurisdiction had expired with the entry of the consent judgment granting Blair's damages claims. *Id.* at 1520 (App. A at 31).

III. SUMMARY OF THE ARGUMENT

Issuing a writ of certiorari in this action would be improvident. This action is not a vehicle for ensuring the supremacy of federal law, resolving any conflict over an unsettled issue of constitutional or statutory rights, or preserving federalism. The rulings below are merely the product of routine application of Article III's limitations and section 2403's plain language.

Section 2403 intervention is expressly available only for the limited purpose of presenting evidence and argument on the constitutional issues raised by actual litigants between whom there is a real case or controversy; a section 2403 intervenor is not made a typical party to the underlying litigation, although it has "all the rights of a party . . . *to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.*" 28 U.S.C.

§ 2403 (emphasis added); *see generally* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.06[2]. For that reason, section 2403 is not an independent grant of jurisdiction to federal courts, nor does it allow a nonparty to posit a case or controversy where actual parties have not.

The State makes no argument based upon the plain meaning of section 2403, or upon the case law applying it. The State instead argues that section 2403 must, for policy reasons, create independent standing so that states can defend the constitutionality of their statutes from "collusive or inadvertent deals" by the real parties to a case. (State's Petition at 15-16.) Contrary to the State's assertion, the State's loss of standing did not result from acts beyond the State's control or from a "collusive or inadvertent" deal. Rather, the State decided to avoid liability for enactment of a facially unconstitutional law, liability that would have resulted from full-party intervention under Rule 24(a)(2).

Rule 24(a)(2) affords states the opportunity, subject to Article III's limitations, to join actions as parties, thus acquiring all the rights and undertaking all the obligations of a party to the action. *See generally* 7C C. WRIGHT, A. MILLER & A. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1901-02 (2d 3d. 1986). Section 2403 offers the alternative of presenting evidence and argument on constitutional issues without subjecting the State to the primary risk faced by a party,

liability. Apparently attracted by this alternative, the State intervened expressly "[p]ursuant to 28 U.S.C. § 2403(b)." SER 3-4; ER 19 at 1. The State chose to ignore its opportunity to seek standing as a party defendant. The price of avoiding liability is the loss of the right to prolong litigation from which its political subdivision, the City, chose to retire.

The State's citation to *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994) is incongruous. No section 2403 intervenor was present in *Bancorp*, and the *Bancorp* opinion never refers to section 2403. *Bancorp* has absolutely nothing to do with whether a section 2403 intervenor may take an appeal after the case or controversy is resolved, or whether the State may be heard on nonconstitutional issues despite section 2403's express limitation. *Bancorp* does establishes equitable guidelines for courts to apply in considering *vacatur* motions brought by *parties* to actions that have been settled after appeals are taken. Here, in contrast, the State seeks leave to move for *vacatur* as a method of collaterally attacking a consent judgment to which the State itself chose *not* to be a party.

The State's ultimate objective, of course, is to reopen a constitutional dispute fully litigated by a subordinate entity (the City), or failing that, to attack the merits of the trial court's interlocutory opinion by *vacatur*, thus wiping off the books a decision the State dislikes. But this use of *vacatur* as a collateral attack on the merits is

expressly rejected in *Bancorp*. *Bancorp*, 115 S. Ct. at 392-93. Accordingly, the State of California's petition should be denied.

IV. ARGUMENT

A. Blair's Counter-Statement of the Question Presented for Review

Blair respectfully submits that the appropriate question presented for review by the decision of the United States Court of Appeals for the Ninth Circuit is:

> Does 28 U.S.C. § 2403(b) provide standing to nonparty State of California to prolong an action, to which it was never a party, after the actual parties settled the case by a consent judgment that eliminated any case or controversy?

The State's formulation of the question is:

> May a district court declare a state statute unconstitutional in a reported order granting declaratory judgment where non-state litigants moot the controversy and deprive the State, appearing as a government intervenor, of both an opportunity to obtain appellate review and the right to vacate the declaratory judgment?

The State's formulation is both flawed and disingenuous. The District Court did not "deprive" the State of either appellate review or the 'right' to vacate the declaratory judgment. The State participated in this litigation from the safe distance permitted by section 2403. If the State were deprived of any rights, the deprivation was a result of its deliberate decision to remain aloof and of its political subdivision's conduct of the litigation. The City determined to settle this action and forego appeal. The real issue, therefore, is neither one of federal rule interpretation nor trial court discretion. The real issue is whether the

State can establish its standing, both in the constitutional respect of whether a case or controversy still exists under Article III, and in the statutory respect of whether section 2403 authorizes limited intervention other than to present evidence and argument while a constitutional issue remains open.[4/]

B. The Plain Meaning of Section 2403 Limits Intervenors to the Presentation of Evidence and Argument on the Constitutional Issues -- Rights Fully Accorded the State in this Action

Section § 2403 affords the United States and the States the right to intervene "*for presentation of evidence . . . and for argument on the question of constitutionality*" in actions challenging their statutes on federal constitutional grounds. Section 2403(b) provides that the "State shall have all the rights of a party and be subject to all liabilities of a party as to court costs *to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.*" (Emphasis added.)

The plain meaning of the section limits an intervenor's rights to those necessary to present evidence and argument on constitutional issues, such as briefing and arguing constitutional questions, or taking

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4/ In addition, the State's question misreads *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), which does *not* provide any party to any litigation an absolute "right" to vacate any judgment, much less purporting to provide such a right to a limited intervenor under section 2403. *Id.* at 391-93.

an appeal on the issue of a statute's constitutionality. *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986) (standing to appeal the issue of constitutionality); *Vietnamese Fishermans' Ass'n. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982) (scope of intervention under § 2403(b) "limited to presenting evidence and arguments in support of the constitutionality of the statute").

The State participated fully in the instant action, including by briefing and arguing the constitutional issues. *Blair II*, 795 F. Supp. at 318. When, however, the real parties entered into a consent judgment, any actual Article III case or controversy expired, along with the right of appeal. *Tapper v. Commissioner*, 766 F.2d 401, 403 (9th Cir. 1985) ("Generally, a party cannot appeal a judgment entered with its consent."); *accord Coughlin v. Regan*, 768 F.2d 468, 469-70 (1st Cir. 1985).

Because the State continuously elected not to become a party defendant, it could neither assist or resist the parties' settlement of the case. The State purported to move under Rule 60(b) to vacate the consent judgment, but the issues raised by the Rule 60(b) motions did not implicate the constitutional questions on which the State intervened under section 2403. Rather, the only issues raised by the Rule 60(b) motions were (1) whether the City could establish some mistake, inadvertence, surprise, or excusable neglect that would justify

vacating the judgment and (2) whether *vacatur* was appropriate.[2/] Because the Rule 60(b) motions focused on the nonconstitutional issues of whether the State and the City had surrendered their appellate opportunities because of their own conduct, the District Court and Ninth Circuit correctly determined that the State lacked standing to participate.

C. Certiorari is Inappropriate Because the Courts Have Uniformly Held that Standing Under Section 2403 is Limited to Participation in the Consideration of Constitutional Issues

Because the purpose and scope of section 2403 is apparent from its plain language, the few courts applying section 2403 have limited intervenors to the presentation of evidence and argument on constitutional issues. In *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the district court held unconstitutional Arizona's ballot initiative declaring English to be Arizona's official language. The Governor of Arizona, a party in the trial court, chose not to appeal. *Id.* at 730. Because the Ninth Circuit permitted the initiative's proponents to intervene as parties for purposes of taking an appeal, the Arizona Attorney General was also permitted to intervene in the appeal. However, the Attorney General's intervention was limited to making

> an argument on the question of constitutionality. . . . [H]e is given no right to appeal *as a party*. Before the Attorney General can assert any right at all there must be a viable proceeding in which that

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2/ *See infra* IV(E) & (F).

right may be asserted . . . . We emphasize that under § 2403(b) the Attorney General is not a party . . . . So long as there is . . . an appeal he may file a brief and participate in the oral argument.

Id. at 739-40 (emphasis in original).[6]

This is precisely the rule of law followed by the District Court in this case: "[Under section 2403(b)] the state has all the rights of a party to the extent necessary for the presentation of facts and law concerning *the constitutionality of section 647(c).* . . . . [The issue of vacatur] "has no bearing on the constitutionality of § 647(c)." *Blair II*, 795 F. Supp. at 318 (N.D. Cal. 1992) (App. C at 70) (emphasis in original).[7]

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[6] *Yniquez* also stressed "[i]t is only because we hold that [the initiative's proponents] may appeal that we conclude that there is such a proceeding and that the Attorney General may, therefore, pursuant to § 2403(b), make an argument regarding constitutionality." 939 F.2d at 739. The Attorney General could not take an appeal from the trial court's decision because he had been dismissed from the case below on his own motion. *Id.* at 738. This is in contrast to the state intervenor in *Maine v. Taylor*, 477 U.S. 131, 136-37 (1986), which had been a section 2403 intervenor in the trial and appellate courts, and thus, as an intervenor below, was in position to take an appeal to the Supreme Court on the constitutional issues.

The facts of this case are similarly different from *Maine*. Here, the State was a section 2403 intervenor below, *but* the action was settled by a consent judgment that did not preserve (or even mention) appellate rights. *Blair*, 38 F.3d at 1518-20 (App. A at 35-36). In *Maine*, however, the defendant had entered a guilty plea on the condition that the constitutional issue would remain subject to appeal. 477 U.S. at 136-37.

[7] The Ninth Circuit's affirmance is based on similar reasoning:

(footnote continued on following page)

There is thus no conflict among the courts, and no unsettled question of import regarding the application of section 2403, which warrants a writ of certiorari in this case.

D. The Federal Courts Have No Jurisdiction over the State's Purported Appeal Because the Consent Judgment Eliminated Any Article III Case or Controversy

Section 2403 intervenors are not exempt from the limitations of Article III's case or controversy requirement, any more than the original parties or Rule 24 intervenors in federal court litigation. *E.g.*, *Maine*, 477 U.S. at 136-37 (intervenor). In fact, it would be illogical (as well as unconstitutional) to afford a section 2403 statutory *amicus* greater appeal rights than a regular party from whom the section 2403 intervenor's rights are derived. Here the case or controversy was based solely on Blair's claim under 42 U.S.C. § 1983 for damages

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(footnote continued from previous page)

> The district court properly held that the motion to vacate the consent judgment had nothing to do with the "facts and law relating to the question of [the] constitutionality" of section 647(c). 28 U.S.C. § 2403(b). Though we understand the State's interest in vacating the consent judgment so that it could obtain review of the constitutionality of section 647(c), 28 U.S.C. § 2403(b) does not allow a State standing to participate in a motion where questions of constitutionality are not among the issues argued.

Blair, 38 F.3d at 1522; *accord Vietnamese Fishermans' Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982) (denying intervention under section 2403, relying on the limitation to "presenting evidence and arguments in support of the constitutionality of the statute").

resulting from the violation of his constitutional rights. When that claim was resolved by settlement, which was memorialized in a consent judgment, the Article III case or controversy -- and any subject matter jurisdiction of the federal courts -- terminated. *Blair*, 38 F.2d at 1518-20 (App. A at 31).

It is an unremarkable axiom that when a case or controversy is resolved, no jurisdiction remains to support intervention. In *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978), the First Circuit held that no jurisdiction remained to support federal intervention under section 2403 (or Rule 24) after the creditor withdrew its claim to enforce bankruptcy conflicts provisions, and mooted the case or controversy over whether those provisions were constitutional.[8/] In *Ruotolo*, the United States argued, as does the State here, that its strong interest in the constitutionality of the bankruptcy statute was a sufficient replacement for Article III's case or controversy prerequisite to federal jurisdiction:

> [The United States] . . . urges the desirability of a dispositive ruling in this untested area. While we can appreciate that a ruling might be useful, we are unable to see how the case when decided below, or on this appeal, met or meets the justiciability requirements of article III, section 2, of the Constitution. We therefore dismiss the appeal.

[8/] In *Yniguez*, the Ninth Circuit similarly ruled that "[b]efore the Attorney General can assert any right at all there must be a viable proceeding in which that right may be asserted . . . ." 939 F.2d at 739.

Ruotolo, 572 F.2d at 338.

Understandably, the State of California is anxious to revive litigation on the constitutional issues, but no case or controversy remains between Blair and the City to satisfy Article III's requirements for federal jurisdiction.[9/] Thus, this would be an inappropriate case in which to address the rights provided by section 2403, even if such a review were necessary (which it is not), because the jurisdictional defect would bar the Court from reaching the merits of the State's purported appeal.[10/]

9/ The truer measure of the State's purported interest in defending the constitutionality of section 647(c) is perhaps more accurately gauged by its disinterest in becoming a party defendant to this lawsuit.

10/ The issues in this petition are not based on whether the federal courts have the power to consider whether to vacate judgments after the case or controversy has been mooted on appeal -- they clearly do. *Bancorp*, 115 S. Ct. at 390 ("[T]his Court may not consider [] merits [of a judgment mooted while awaiting review], but may make such disposition of the whole case as justice may require.") (*citing Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944)). Instead, the issues are based on whether the State has standing to appeal or to be heard on a Rule 60(b) motion to vacate a consent judgment. As the parenthetical quotation to *Bancorp* reflects, the federal courts do not have subject matter jurisdiction over the State's appeal. The State's standing to bring a Rule 60(b) motion is foreclosed, not by constitutional strictures, but by the limitations of section 2403 discussed in subsection C above.

E. *Bancorp* Is Irrelevant to the State's Standing

The State's misplaced reliance on *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994), which did not even involve section 2403 in any respect, proposes an improper departure from traditional, well established principles governing standing. If accepted, the State's proposal would create "equitable" standing for section 2403 intervenors to seek *vacatur* in the absence of both a case or controversy *and* a constitutional issue. The lower courts in this action have correctly rejected this proposal.

Bancorp is completely irrelevant to any of the issues in this petition. *Bancorp* addresses "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." *Id.* at 388-89.[11/] No party intervened in *Bancorp* under section 2403, and

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11/ *Bancorp* holds that:

> [M]ootness by reason of settlement does not justify vacatur of a judgment under review. This does not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur -- which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed.

Bancorp, 115 S. Ct. at 393.

Bancorp provides no guidance regarding either section 2403's statutory limitation or the ability of section 2403 intervenors to satisfy Article III's constitutional requirements.

F. The State's Policy Argument Fails Because the State Lost Appeal Rights, Not by Happenstance, but Through its Own Decision to Be a Limited Intervenor Rather than a Party Defendant

The State's primary argument is that *Bancorp* confers upon the State standing to appeal or a right to seek *vacatur* of the declaratory judgment, because the mooting of the case or controversy by the settlement among the original parties was beyond the control of the State. State's Petition at 13-15. As described above, this policy argument will never be reached because the State lacks standing under Article III and section 2403. Even on its own merits, however, the State policy argument crumbles.

The State intentionally sought limited intervention and only claimed broader rights *after* the consent judgment was entered. However, the State has never sought to be a party defendant. The State's chosen course preserved to it the benefit of avoiding liability. The State's choice also exposed it to particular risks, one of which was that the parties to the case could settle the action without a State veto.

The State's change of heart is not excused by the Rule 68 consent judgment's foreclosure of the City's right to appeal, any more than the decision of the Arizona Governor in *Yniguez* to forego an appeal excused the Attorney General's change in position in that case.

There the Ninth Circuit concluded that the Attorney General was "judicially estopped" from intervening under Rule 24 because he had successfully convinced the District Court he was not a proper party to the case. *Yniguez*, 939 F.2d at 738. As in *Yniguez*, the State of California must now live with the consequences of its judicial election:

> To allow a party who steps off the statutory path [for appeal] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would -- quite apart from any considerations of fairness to the parties -- disturb the orderly operation of the federal judicial system.

Bancorp, 115 S. Ct. at 392.

The State's ultimate objective is to erase the District Court's declaration that California Penal Code § 647(c) is unconstitutional, because the State assumes that the opinion on the merits is wrong and thus inappropriately "haunts and thereby chills" enforcement of the statute. (State's Petition at 11). *Bancorp* also soundly rejects this use of *vacatur*:

> It seems to us inappropriate, however, to vacate mooted cases, in which we have no power to decide the merits, on the basis of assumptions about the merits.

Id. at 392-93.

In sum, the State's own conduct has deprived it of an opportunity to appeal. The State would not be entitled to *vacatur* even had the Constitution and Congress granted it standing.

V. CONCLUSION

For the foregoing reasons, Respondent Celestus Blair, Jr. respectfully suggests that the State of California's petition for a writ of certiorari be denied.

Respectfully Submitted,

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PROOF OF SERVICE BY MAIL

I, D. Kirk Jamieson, the undersigned, hereby certify and declare under penalty of perjury that the following statements are true and correct:

1. I am an attorney admitted to the Bar of the State of California, and that service was made at that attorney's direction.

2. I am over the age of 18 years and am not a party to the within cause.

3. My business and mailing address is Pettit & Martin, 101 California Street, Suite 3500, San Francisco, California 94111.

4. I am familiar with my employer's mail collection and processing practices; know that said mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail; and know that postage thereon is fully prepaid.

5. Following said practice, on March 24, 1995, I served a true copy of the attached document titled exactly BRIEF IN OPPOSITION by placing it in a sealed envelope (and depositing it in regularly maintained interoffice mail) addressed to the following:

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Executed this 24th day of March, 1995, at San Francisco, California.

D. Kirk Jamieson